Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–468 OF 2006
LOW HOP BING, ABU SAMAH AND RAMLY ALI JJCA
12 OCTOBER 2009

Companies and Corporations — Member's rights — Oppression — Petition under s 181 of the Companies Act 1965 — Whether petitioner proved lack of probity or fair dealing against his rights as shareholder — Whether s 181 procedure could be used as debt collection facility against company — Whether petitioner had locus standi to present petition

Companies and Corporations — Oppression — Oppression of minority — Whether petitioner proved lack of probity or fair dealing against his rights as shareholder — Whether s 181 procedure could be used as debt collection facility against company — Whether petitioner had locus standi to present petition

The appellant, the second and third respondents were directors and shareholders of the first respondent company. The appellant and the third respondent held 100,001 shares each whilst the second respondent held 100,002 shares. Besides being a director, the appellant was also appointed a sales representative of the first respondent. In that capacity, the appellant was given perks such as salary of RM3,000 a month and allowance of RM1,000 a month, a Toyota Camry car and petrol allowance in the form of a Shell card. As a sale representative for the first respondent company, the appellant had been managing the first respondent company from 1990 until April 2001. Dissatisfaction arose among the respondents when in or about February 2001, the respondents noticed the appellant's lack of participation or interest in the running of the first respondent company. The appellant was not keen to agree with any plans for the first respondent company to expand its business. The respondents came to know of the appellant's involvement in another company whose main business was similar to that of the first respondent company. The first respondent therefore cancelled the appellant's Shell card and demanded the return of the company car. At the relevant time a sum of RM252,407.35 (as the director's fees) was due to the appellant. The same amount was also due to the second and third respondents as their respective director's fees. Upon the first respondent's failure to pay the director's fees, the appellant served a statutory notice under s 218 of the Companies Act 1965 ('the Act') on the first respondent. The second and third respondents requisitioned for an EGM of the first respondent to remove the appellant as a director, to increase the first respondent's authorised capital for

its' expansion plans and to set off the director's fees owed by the first respondent to all the directors by allotment and issue of shares credited as fully. The appellant claimed that the proposed resolutions were oppressive to him and petitioned for relief under s 181 of the Act. The petition was dismissed by the learned judicial commissioner. Hence this appeal.

Held, dismissing the appeal with costs:

(1) Under s 181(1)(a), there must be shown the element of 'oppression' or 'disregard'. It must involve, at least, an element of lack of probity or fair dealing to a member against his right as member or shareholder. Oppression or disregard of interest on a director of a company clearly does not come under the ambit of s 181 (see para 20).

(2) The appellant's complaint regarding the proposed resolution to remove him as a director and the withdrawal of the company car and the Shell card was in relation to the status of the appellant as a 'director' or 'sales representative' and not as a shareholder of the company. Thus, the court had no jurisdiction to entertain such proceedings (see para 30).

(3) The appellant presented the petition under s 181 of the Act to exert pressure on the first respondent company to pay him the director's fees. Section 181 does not assist the appellant to exert pressure on the first respondent company to pay him the director's fees. Section 181 is not meant to be used as 'debt collection facility' by a director against the company (see paras 33–34).

(4) The resolution to increase the first respondent company's authorised capital was necessary to obtain financing for its expansion plan. The resolution to set-off the fees due to all the directors of the first respondent company by allotting new shares of 757,200 to each of them was necessary to preserve the cash flow of the company in view of the plan for expansion. Furthermore, such exercise would collectively affect all three shareholders of the company and would not single out the appellant alone and prejudice his rights as shareholder. There was no element of unfair discrimination or disregard of the appellant's interest as shareholder of the first respondent company (see para 37).

(5) The appellant's complaints comprised mainly matters within the internal management of the company. Granting and withdrawal of perks to directors, company executives or employees are purely regulated within the company itself. Issuance of shares within a company as well as appointment and removal of directors are also matters to be decided and implemented by the company itself according to its memorandum and articles of association, either by the board of directors or the shareholders in general meeting. In making these decisions, generally, the majority rules. It is only when majority

rule passes over into rule oppressive of the minority or in disregard of their interest, that s 181 can be invoked. The court, under the pretext of minority protection under s 181, should be slow in interfering or enquiring into the desirability or wisdom of the acts of those who control or manage the company's affairs. The provisions of s 181 should not be stretched too far so as to allow minority or individuals to abuse them just because they do not agree or are dissatisfied with the action taken by the majority or the board of directors (see paras 40 & 42).

[Bahasa Malaysia summary

Perayu, responden kedua dan ketiga merupakan pengarah-pengarah dan pemegang-pemegang saham syarikat responden pertama. Perayu dan responden ketiga memegang 100,001 saham setiap seorang manakala responden kedua memegang 100,002 saham. Di samping menjadi pengarah, perayu juga dilantik sebagai wakil jualan responden pertama. Di dalam kapasiti tersebut, perayu diberikan faedah-faedah seperti gaji RM3,000 sebulan dan elaun sebanyak RM1,000 sebulan, kereta Toyota Camry dan elaun petrol dalam bentuk kad Shell. Sebagai wakil jualan syarikat responden pertama perayu telah mengurus syarikat responden pertama dari tahun 1990 hingga April 2001. Perasaan tidak puas hati timbul di antara responden-responden apabila pada atau lebih kurang Februari 2001, responden-responden mendapati kekurangan penglibatan atau minat perayu di dalam pengurusan syarikat responden pertama. Perayu tidak berminat untuk bersetuju dengan apa-apa rancangan untuk syarikat responden pertama memperluaskan perniagaannya. Responden-responden mendapat tahu mengenai penglibatan perayu di dalam syarikat lain yang perniagaan utamanya adalah serupa dengan syarikat responden pertama. Responden pertama oleh itu membatalkan kad Shell perayu dan menuntut pemulangan kereta syarikat. Pada masa yang relevan sejumlah RM252,407.35 (sebagai fi pengarah) tertunggak kepada perayu. Jumlah yang sama juga tertunggak kepada responden-responden kedua dan ketiga sebagai fi pengarah masing-masing. Atas kegagalan responden pertama membayar fi pengarah, perayu menyerahkan notis statutori di bawah s 218 Akta Syarikat 1965 ('Akta') ke atas responden pertama. Responden kedua dan ketiga menuntut untuk EGM responden pertama untuk menyingkir perayu sebagai pengarah, untuk menambah modal yang dibenarkan responden pertama untuk rancangan pengembangannya dan untuk penolakan fi pengarah yang terhutang oleh responden pertama kepada kesemua pengarahnya dengan peruntukan dan pemberian saham yang dikreditkan sebagai penuh. Pengarah memohon bahawa resolusi yang dicadangkan adalah menindas terhadapnya dan memasukkan petisyen untuk relief di bawah s 181 Akta. Petisyen tersebut telah ditolak oleh pesuruhjaya kehakiman. Maka rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Di bawah s 181(1)(a), perlu ditunjukkan elemen 'opression' atau

'disregard'. Ia mesti melibatkan, sekurang-kurangnya elemen kekurangan kejujuran atau urusan adil kepada ahli terhadap haknya sebagai ahli atau pemegang saham. Penindasan atau ketiadaan minat oleh pengarah syarikat jelas tidak terangkum di dalam s 181 (lihat perenggan 20).

(2) Aduan perayu berkenaan resolusi yang dicadangkan untuk menyingkirkannya sebagai pengarah dan penarikan balik kereta syarikat dan kad Shell adalah berkaitan dengan status perayu sebagai 'pengarah' atau 'wakil jualan' dan bukan sebagai pemegang saham syarikat. Oleh itu mahkamah tidak mempunyai bidang kuasa untuk melayan prosiding sebegitu (lihat perenggan 30).

(3) Perayu mengemukakan petisyen di bawah s 181 Akta untuk memberikan tekanan kepada syarikat perayu pertama untuk membayarnya fi pengarah. Seksyen 181 tidak membantu perayu untuk memberikan tekanan kepada syarikat responden pertama untuk membayarnya fi pengarah. Seksyen 181 tidak bermaksud untuk digunakan sebagai 'debt collection facility' oleh pengarah terhadap syarikat (lihat perenggan 33–34).

(4) Resolusi untuk menambah modal yang diberi kuasa syarikat responden pertama adalah perlu untuk mendapatkan kewangan untuk rancangan pengembangannya. Resolusi untuk penolakan fi yang terhutang kepada kesemua pengarah syarikat responden pertama dengan memperuntukkan saham sebanyak 757,200 kepada setiap seorang daripada mereka adalah perlu untuk menentukan aliran tunai syarikat berkaitan dengan rancangan pengembangannya. Tambahan lagi, pelaksanaan sedemikian akan secara bersama memberi kesan kepada ketiga-tiga pemegang syarikat dan tidak akan mengecualikan perayu seorang diri dan menjejaskan haknya sebagai pemegang saham. Tidak ada elemen diskriminasi tidak adil atau tidak mengendahkan kepentingan perayu sebagai pemegang saham syarikat responden pertama (lihat perenggan 37).

(5) Aduan perayu melibatkan perkara-perkara terutamanya berkaitan pengurusan dalaman syarikat. Pemberian dan penarikan balik faedah kepada pengarah-pengarah, eksekutif syarikat atau pekerja-pekerja adalah dikawal khususnya dalam syarikat itu sendiri. Pemberian saham dalam syarikat dan pelantikan dan pembuangan pengarah-pengarah juga adalah perkara-perkara yang perlu diputuskan dan dilaksanakan oleh syarikat itu sendiri menurut memorandum dan artikel pertubuhan, sama ada oleh lembaga pengarah atau pemegang-pemegang syarikat dalam mesyuarat agung. Dalam membuat keputusan ini, amnya, majoriti membuat keputusan. Hanya apabila keputusan majoriti mengatasi keputusan menindas minoriti atau tanpa mempertimbangkan kepentingan mereka, s 181 boleh

dibangkitkan. Mahkamah di bawah dalih perlindungan minoriti di bawah s 181, seharusnya tidak campur tangan atau mempersoalkan kebaikan atau kewajaran tindakan mereka yang mempunyai kawalan dan pengurusan terhadap perjalanan syarikat. Peruntukan s 181 tidak boleh dilanjutkan dengan lebih untuk membenarkan minoriti atau individu-individu untuk menyalahgunakannya semata-mata kerana mereka tidak bersetuju atau tidak puas hati dengan tindakan yang diambil oleh majoriti atau lembaga pengarah (lihat perenggan 40–42).]

Notes

For cases on oppression, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 496–543.

For cases on oppression of minority, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 573–577.

Cases referred to

Bellador Silk Ltd, Re [1965] 1 All ER 667, Ch D (refd)

Foss v Harbottle (1843) 2 Hare 461 (refd)

Harben v Phillips (1883) 23 Ch D 14 (refd)

In the Matter of Tahansan Sdn Bhd [1984] 1 MLJ 204, HC (refd)

Kong Thai Sawmill (Miri) Sdn Bhd, Re; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung [1978] 2 MLJ 227, PC (refd)

Lord v Governor & Co of Copper Miners (1848) 2 Ph 740 (refd)

Lundie Brothers Ltd, Re [1965] 1 WLR 1051, Ch D (refd)

M Dalley & Co Pty Ltd, Re (1968) 1 ACLR 489, HC (refd)

Niord Pty Ltd v Adelide Petroleum NL [1990] 8 ACLC 684, SC (refd)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113; [1996] 4 CLJ 716, FC (refd)

Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326, HC (refd)

Tong Eng Sdn Bhd (Loh Loon Keng, petitioner), Re [1994] 1 MLJ 451; [1994] 2 CLJ 775, HC (refd)

Verghese Mathai v Telok Plantations Sdn Bhd & Ors [1988] 3 MLJ 216, HC (refd)

Westbourne Galleries, In re [1973] AC 360, HL (refd)

Legislation referred to

Companies Act 1965 ss 16(6), 131(5), 132(2), 158, 181, 181(1)(a), (2), 218

Appeal from: Petition No MT4–26–5 of 2001 (High Court, Johor Bahru)

Clarence Edwin (R Paramanandan with him) (Clarence Edwin Law Offices) for the appellant.

Chin Yew Chong (Woon Wee Yuen with him) (Woon Wee Yuen & Partners) for the respondents.

Ramly Ali JCA:

[1] The appellant filed a petition under s 181 of the Companies Act 1965 against the respondents alleging that the affairs of the first respondent company are being conducted or the powers of the directors are being exercised in a manner oppressing to himself; or that some act of the first respondent company has been done or that some resolution has been passed which unfairly discriminates against or is otherwise prejudicial to himself.

[2] After full trial where witnesses were cross-examined on their respective affidavits, the learned judicial commissioner dismissed the petition with costs. Hence the present appeal before this court.

RELEVANT FACTS

[3] The appellant, the second and third respondents, were at all material times, directors and shareholders of the first respondent company, Advance Colour Laboratory Sdn Bhd. The appellant and the third respondent held 100,001 shares each whilst the second respondent held 100,002 shares.

[4] Besides being a director, the appellant was also appointed a sales representative of the first respondent. In that capacity, the appellant was given perks such as salary of RM3,000/month and allowance of RM1,000/month, a Toyota Camry car and petrol allowance in the form of a Shell card. As a sale representative for the first respondent company, the appellant has been managing the first respondent company from 1990 until April 2001.

[5] Dissatisfaction arose among the respondents when in or about February 2001, the respondents noticed the appellant's lack of participation or interest in the running of the first respondent company. The appellant was not keen to agree with any plans for the first respondent company to expand its business. The second and third respondents' suggestions to purchase office equipment and digital photo processing machine were rejected by the appellant. Later, the respondents come to know of the appellant's involvement in another company known as Meta Graphic Sdn Bhd whose main business was similar to that of the first respondent company. The respondents had also noted that the appellant has not accorded any time and effort in managing the day to day business and operation of the first respondent company.

[6] The respondents aver that the appellant as a director of the first respondent has failed to disclose his involvement in Meta Graphic Sdn Bhd

and has placed himself in a position of conflict of interest; thus breaching his fiduciary duties, management duties and responsibilities as a director owed to the first respondent company.

[7] In or about March 2001, the first respondent cancelled the appellant's Shell card and issued a notice (dated 13 March 2001) to demand the return of the company car given to the appellant. The appellant then returned the said car and the Shell card to the first respondent on 16 March 2001.

[8] The appellant alleges, inter alia, that the respondents' demand for the return of the company car and petrol allowance (in the form of a Shell card) had in effect forced him to resign as sales representative of the first respondent company.

[9] It is not seriously disputed that at the relevant time a sum of RM252,407.35 (as the director's fees) was due and not paid by the first respondent to the appellant. The same amount was also due and not paid to the second and third respondents as their respective director's fees. The appellant served a notice of demand dated 2 April 2001 to the first respondent demanding the said amount due to him. The first respondent failed to pay on the said demand. This prompted the appellant to serve a statutory notice under s 218 of the Companies Act 1965.

[10] Thereafter there were discussions and negotiations between the appellant and the respondents to resolve the issue with the view of getting the appellant to resign as a director of the first respondent. However, the appellant refused to do so.

[11] Following the s 218 notice, the second and third respondents requisitioned for an EGM of the first respondent for the purpose of passing the following resolutions:

(a) to remove the appellant as a director of the first respondent;

(b) to increase the first respondent's authorised capital for its' expansion plans; and

(c) to set off the director's fees owed by the first respondent to each of the directors (comprising the appellant and the second and third respondents) by allotment and issue of 757,200 shares of RM1 each credited as fully paid in the first respondent.

[12] The appellant was unhappy with the EGM called and the resolutions proposed on the ground that it was oppressive to him and hence instituted the present proceedings against the respondents for relief under s 181 of the

Companies Act 1965. The petition proceeded for full trial before the learned judicial commissioner. The petition was dismissed with costs by the learned judicial commissioner on 27 February 2006 upon considering all the facts, evidence and submissions by the parties.

FINDINGS OF THE LEARNED JUDICIAL COMMISSIONER

[13] After full trial of the petition, the learned judicial commissioner came to the following findings:

(a) that the resolution to remove the appellant as director was neither oppressive nor unfairly prejudicial to the appellant;

(b) that the management of the first respondent company had not acted unfairly or in an oppressive manner or in a manner prejudicial to the appellant as the perks were taken away from the appellant as he had failed to accord time or effort in the management and administration of the first respondent company coupled with his failure in carrying out his fiduciary duties and responsibilities as director of the company;

(c) that the resolution sought to be passed by the second and third respondents to set off the directors' fees by issuance of shares in the first respondent company would collectively bind all shareholders and would not unfairly discriminate or prejudice the appellant alone in his capacity as shareholder more than other shareholders. Therefore, there was no oppression within the meaning of s 181 of the Companies Act 1965.

[14] The learned judicial commissioner also held that the appellant had failed to show that he was unfairly discriminated against or prejudiced as a shareholder or member of the first respondent company, and therefore cannot seek reliefs under s 181(2) of the Companies Act 1965.

[15] The learned judicial commissioner also held that the court should not interfere with the internal affairs and management of a company as such matters should and could be resolved by the shareholders in general meetings.

THE LAW

[16] The basis of the appellant's petition lies in the wordings of s 181 or the Companies Act 1965 which provides:

> 181(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

[17] The protection accorded under s 181 is only given to the following persons, namely:

(a) member or shareholder of a company;

(b) holder of a debenture of a company; and

(c) in the case of a declared company under Part IX, the Minister (charged with responsibility for companies).

Other than those persons stated above, no other persons can claim any protection or relief under s 181, not even a director, executive or employee of a company.

[18] If the petition or application is made by a member or shareholder of a company, the petitioner must be able to satisfy the court that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or shareholders (including himself) or in disregard of his interest as member or shareholder of the company.

[19] Alternatively, the petitioner must be able to satisfy the court that some act of the company has been done threatened or that some resolution of the members or shareholders has been passed or is proposed which unfairly discriminates against or otherwise prejudicial to one or more of the members or shareholders (including himself).

[20] If the petitioner relies on sub-s (1)(a) of s 181, there must be shown the element of 'oppression' or 'disregard'. It must involve, at least, an element of lack of probity or fair dealing to a member against his right as member or shareholder. Oppression or disregard of interest on a director of a company clearly does not come under the ambit of s 181.

[21] Generally, the words 'member' and 'shareholder' have been used interchangeably. In this respect, Plowman J in dealing with the same issue in

A the case of *Re Lundie Brothers Ltd* [1965] 1 WLR 1051 had said: 'As a member of the company, means of course as shareholder of the company.'

[22] In the Companies Act 1965, both the words 'member' and 'shareholder' are being used in their respective contexts. There is no specific B definition for the two words provided in the definition section of the Act. However, s 16(6) of the Act provides:

> The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its register of members, and every other person who agrees C to become a member of a company and whose name is entered in its register of members shall be a member of the company.

[23] Generally, there are two types of companies incorporated under the Companies Act 1965, namely, company limited by guarantee; and company D limited by shares (or company having a share capital). For company limited by guarantee no share is issued. Thus there is no shareholder involved. The members of this type of company are known as 'members', not 'shareholders'. For company limited by shares or company having share capital, the members are shareholders of the company and their particulars are kept in the register E of members pursuant to s 158 of the Act.

In short, under the Companies Act 1965 the word 'members' conveys a wider scope to include shareholders (for company with share capital) as well as members (for company limited by guarantee). In other words, all F shareholders of a company are members but not all members are shareholders of the company.

[24] The above classification goes to show that for the purpose of s 181 of the Act, other than debenture holder and the Minister, which is not the case G in the present appeal, only member or shareholder of a company can initiate petition under the section.

[25] Lord Cross in *In Re Westbourne Galleries* [1973] AC 360 had once expressed that: 'to give the court jurisdiction under this section (210) the H petitioner must show both that the conduct of the majority is 'oppressive' and that it effects him in his capacity as a shareholder.'

[26] In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113; [1996] 4 CLJ 716 the Federal Court ruled the following:

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> The category of persons within a company who may present a petition under s 181 of the Act would be, as a general rule, only one who comes within the terms of s 16(6). This would mean that a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition.

> Put another way, in general, a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition: if he is unable to do so, then he has no standing to invoke the jurisdiction conferred upon the court by the section …

[27] In *Niord Pty Ltd v Adelide Petroleum NL* [1990] 8 ACLC 684, the court in Australia held that an applicant must be registered as a member before he could complain of oppressive conduct and that a mere equitable interest as an unregistered transferee was not sufficient.

[28] In *Re M Dalley & Co Pty Ltd* (1968) 1 ACLR 489, the question of standing was raised and the court ruled that the onus of proving that the petitioner was qualified under the then Australian equivalent of s 181 was on the petitioner. Lush J, in that case, further held that membership for that purpose could not be established unless it was shown that at the date of the petition, the petitioner was registered in the register as the holder of shares.

[29] The s 181 remedy is a creature of statute and basically, unless the applicant comes squarely within the section the court ought not to entertain the action. This position has been succinctly stated by Siti Norma Yaacob J in *Verghese Mathai v Telok Plantations Sdn Bhd & Ors* [1988] 3 MLJ 216 as follows:

> As the petitioner's locus standi is regulated by statute, he must comply strictly with the mandatory provisions of s 181 …

[30] In the present case, the appellant's first complaint relates to the proposed resolution at the EGM to remove him as a director of the first respondent and the respondents' action to withdraw the company car and the Shell card given to him as a sales representative of the first respondent. This complaint clearly is in relation to the status of the appellant as a 'director' or 'sales representative', but not as a member or shareholder of the first respondent company. Therefore, the court has no jurisdiction to entertain such proceedings. On this ground alone, the appellant's petition must fail.

[31] The same principle was applied by Plowman J in the case of *Re Lundie Brothers Ltd* where His Lordship held:

> … His main grievance is, as he admitted in the witness box, that he has been ousted as a working director. That, it seems to me, has nothing to do with his status as a shareholder in the company at all. The same thing is equally true in regard to his complaint that his remuneration as a director of the company has been reduced. That relates to his status as a director of the company, and not to his status as a shareholder of the company.

[32] The same principle was also followed by Chan J in *In the Matter of Tahansan Sdn Bhd* [1984] 1 MLJ 204 (at p 211) where it was held:

> The fact that the petitioner in the present case was ousted as a director and that he was deprived of his directors' remuneration relates only to his status as a director, and not to his status as a shareholder. The court, therefore, is not given jurisdiction in a situation like this to make an order under s 181.

[33] From the sequence of events as presented in evidence during trial, there is a clear indication that the actual purpose for the appellant to present the petition under s 181 of the Companies Act 1965 was to exert pressure on the first respondent company to pay him the director's fees of RM252,407.35. In fact the appellant has gone to the extent of issuing a statutory notice under s 218 of the Companies Act 1965, with a view to wind up the first respondent company.

[34] Section 181 does not provide any assistance to the appellant to exert pressure on the first respondent company to pay him the director's fees. Section 181 is not meant to be used as 'debt collection facility' by a director against the company. If at all the said amount is due to the appellant as director's fees, the appellant may file a civil claim against the first respondent, but surely not by way of a petition under s 181.

[35] There are authorities for saying that even if the directors or majority shareholders have been guilty of improper or unreasonable conduct so that there appears to be a prima facie case for relief under s 181, it will be refused if the real purpose of the petition is to obtain payment of money allegedly owed by the company (see *Re Bellador Silk Ltd* [1965] 1 All ER 667 and *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326).

[36] The proposed resolution at the EGM to remove the appellant as director of the first respondent and the respondents' action to withdraw all the perks (with company car and the Shell card) from the appellant in his capacity as sales representative of the first respondent company cannot be said to be oppressive or unfairly prejudicial to the appellant. The decision to remove the appellant as director of the first respondent company was rightly made based on the following grounds:

(a) that the appellant became a director of another company known as Meta Graphics Sdn Bhd, a company with its main business similar to that of the first respondent company;

(b) that the appellant had put himself in the position of conflict of interest within the meaning of s 132(2) of the Companies Act 1965. The appellant's failure to declare his directorship in Meta Graphics Sdn Bhd

which was in direct conflict with his duties owed to the first respondent company is in contravention of s 131(5) of the Companies Act 1965;

(c) that the appellant had, since the month of March 2001, not accorded time and effort in managing the day to day business and operation of the first respondent company;

(d) that the appellant had not been performing his fiduciary and management duties and responsibilities as director of the first respondent company since the month of March 2001 and had refused to co-operate in the management of the company;

(e) the appellant's repeated refusal to agree with any plan to increase the capital of the first respondent company; to modernise the first respondent company, for instance, the need to upgrade its equipment to digital format and to make it more competitive; and

(f) from the overall conduct of the appellant, one may reasonably infer that he was not interested in taking care of the interest of the first respondent company.

[37] Based on the evidence available, the resolution to increase the first respondent company's authorised capital from RM350,000 to RM5,000,000 was necessary to obtain financing for its expansion plan. The resolution to set off the fees due to all the directors of the first respondent company as at 31 May 2000 by allotting new shares of 757,200 to each of them was necessary to preserve the cash flow of the company in view of the plan for expansion. Furthermore, such exercise would collectively affect all three shareholders of the company and would not single out the appellant alone and prejudice his rights as shareholder. There is no element of unfair discrimination against the appellant. There is also no element of disregard of his interest as shareholder of the first respondent company.

[38] There is nothing to show that the appellant is affected apart from and over and above the other two shareholders (the second and third respondents) so as to enable him to seek any relief under s 181 of the Act (see *Re Tong Eng Sdn Bhd (Loh Loon Keng, petitioner)* [1994] 1 MLJ 451 at p 454; [1994] 2 CLJ 775 at p 778).

[39] In any event, the proposal to set off the amount due as director's fees by the allotment and issue of 757,200 shares of RM1 each credit as fully paid in the first respondent company is not compulsory to be taken up by the shareholders (including the appellant). The said proposal is followed by a proviso 'or failing which, repayment of the same subject to terms and conditions to be discussed'. In other words, if any of shareholders (including the appellant) do not agree to the set off proposal, then repayment of the

director's fees will be made to them subject to terms and condition to be discussed. That being the case, such proposed resolution cannot be said to be oppressive or unfairly prejudicial to the appellant as he claimed.

CONCLUSION

[40] The appellant's complaints comprise mainly matters within the internal management of a company incorporated under the Companies Act 1965. Granting and withdrawal of perks to directors, company executives or employees are purely regulated within the company itself. Issuance of shares within a company as well as appointment and removal of directors are also matters to be decided and implemented by the company itself according to its memorandum and articles of association (M & A), either by the board of directors or the shareholders in general meeting. There are sufficient guidelines and rules to follow as provided in the M & A itself as well as in the relevant provisions of the Companies Act 1965 and the Companies Regulations. In making these decisions, generally, the majority rules. It is only when majority rule passes over into rule oppressive of the minority or in disregard of their interest, that s 181 can be invoked. Persons who join a company (as shareholder) must learn to accept majority rule.

[41] As precisely explained by Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 (PC):

> The mere fact that one or more of those managing the company possess a majority of the voting powers and, in reliance upon that power, make policy or executive decisions which the complainant does not agree is not enough. Those who take interest in companies limited by shares have to accept majority rule.

[42] The rule in *Foss v Harbottle* (1843) 2 Hare 461 has laid down a well known principle which has resulted from the refusal of the court to interfere in the management of a company at the instance of a minority of its members who are dissatisfied with the conduct of the company affairs by the majority or by the board of directors. The court, under the pretext of minority protection under s 181, should be slow from interfering or enquiring into the desirability or wisdom of the acts of those who control or manage the company's affairs. It cannot be the function of the court to take management decisions and to substitute its opinions for those of the directors and the majority of the members. If the thing complained of is a thing which in substance the majority of the company are entitled to do in accordance with the relevant rules and regulations then it is only prudent that a meeting of the members be called and ultimately let the majority get their wishes. The justification for the rule is the need to preserve the right of the majority to decide how the company's affairs shall be conducted (see *Lord v Governor &*

Co of Copper Miners (1848) 2 Ph 740 at p 751 and *Harben v Phillips* (1883) 23 Ch D 14 at p 39 — per Cotton LJ).

The provisions of s 181 of the Companies Act 1965 should not be stretched too far so as to allow minority or individuals to abuse them just because they do not agree or dissatisfied with the action taken by the majority or the board of directors. Otherwise, company's operation will collapse.

[43] Based on the above considerations, the court is satisfied that the appellant has failed to prove his claims under s 181 of the Companies Act 1965. The matters complained of are not matters which affect his right and interest as a shareholder of the first respondent company. There is no element of oppression, prejudice or unfair discrimination against him. The learned judicial commissioner was right in dismissing the appellant's petition and in holding that the court should not interfere in the internal management of the company's affair as such matters should and could be resolved by the shareholders in general meeting.

[44] Therefore, the appeal is unanimously dismissed with costs of RM5,000 to be paid by the appellant to the respondents. Deposit to the respondents on account of fixed costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum